THE MADRAS LAW JOURNAL

MARCH OF LAW, 1977

Introduction

Certainty of the law, consistency of rulings and comity of Courts, all flowing from the same principle converge to the conclusion that a decision once rendered must later bind like cases except in exceptional circumstances, where by obvious inadvertence or oversight a judgment fails to notice a plain statutory provision or obligatory authority running counter to the reasoning, in which cases it may not have the sway of binding precedents[1]. At the same time it has been recognised that judicial consistency is not the highest state of legal bliss and law must grow; it cannot afford to be static and, therefore Judges ought to employ an intelligent technique in the use of precedents; "precedents should be stepping stones and not halting places."[2] The Blackstonian fiction that Judges do not make law is not now accepted. Lord Denning, M.R. observes: "Many of the Judges in England have said that they do not make law. They only interpret it. This is an illusion which they have fostered. But it is a notion which is being discarded everywhere. Every new decision—on every new situation—is a development of the law. Law does not stand still. It moves continuously"[3] In such development, decisions arrived at after full argument by counsel carry great weight. There is much force in the observation of Hankford J., made long long ago, in 1409, that "argued law is tough law". Nearly five centuries and a half later, Megarry, J., has endorsed it remarking: "today as of old by good disputing shall the law be well-known".[1] A decision reached after the testing and refining process of argument naturally carries great weight and authority as an exposition of the concerned law in relation to the fact situation. During 1977 about 18 judgments of the Supreme Court have been reported in the columns of this Journal besides almost all the imporant decisions of our High Court. An endeavour is made hereunder to refer briefly to the course of the march of law in some of the well-known and fairly significant titles of law.

Courts: their jurisdiction, powers and duties:

In *Kodiketti Nadar* v. *M. L.M. Fernando*[2], it is pointed out that pragmatically a Letters Patent appeal is a second appeal, but in the absence of any inhibitions as provided under section 100, Civil Procedure Code the Jurisdiction exercisable by the Court under Clause 15 of the Letters Patent appears to be vast and might include sometimes the reappraisal of facts and merits; that on that score, under the guise of reappraisal the Court exercising jurisdiction under the Letters Patent would not be justified in interfering with the concurrent findings of fact rendered by the single Judge who, after considering the evidence and the records came to certain conclusions in which he agreed with the trial Court and that in such a case it would be difficult for the Court exercising jurisdiction under the Letters Patent to brush aside such concurrent findings of fact and once again for a third time consider the evi-

1. *Mahabaleshwar Prasad* v. *Kanhaiyalal,* (1975) 2 S.C.J. 376 : A.I.R. 1975 S.C. 907.
2. *The Punjab University, Chandigarh* v. *Vijay Singh Lamba,* A.I.R. 1976 S.C. 1441.
3. *See* Foreward to The Supreme Court of India by Rajeev Dhavan, p. vii.

1. *Cordell* v. *Second Clanfield Properties Ltd* (1968) 3 W.L.R. 864.
2. (1977) 1 M.L.J. 141.

dence and the record to find otherwise. *Jayam & Co.* v. *Gopi Chemical Industries, India*[1], makes it clear that under the Civil Procedure Code the local limits of the ordinary original jurisdiction of the High Court is a 'district' and the fact that the original side of the High Court comes within the definition of 'district' in the Trade and Merchandise Marks Act does not mean that the original side rules and the Letters Patent are not applicable to a suit instituted in the High Court for infringement of a registered trade mark. *Subramania Mudaliar* v. *Ideal Finance Corporation*[2], states that in recent years superior Courts in our land have been applying the fundamental principles of natural justice to a wide variety of proceedings in cases classified by academic writers under the head 'administrative law' and that recent trends in Court-decisions show that the principle of natural justice, of notice to the party affected, must be applied even to purely administrative decision-making, if that should affect an individual's right. *Miss Sathya Rao* v. *University of Madras*[3], holds that it is a principle of interpretation of statutes that a statutory provision shall not be so interpreted as to fail to reach a very large proportion of things, matters or persons sought to be covered by the statutes and that it is equally well-settled that if the choice is between two interpretations the narrower of which would fail to achieve the manifest purpose of the legislation the Court should avoid a construction which would lead the legislation to futility or render the same ineffective and should rather accept the construction based on the other view that the Legislature would legislate only for the purpose of bringing about an effective result. *Thiruvallurammal* v. *Kullachiammal*[4], expresses the view that section 41 of the Lunacy Act can be invoked either before or after the order of inquisition is made, the power can be exercised by the Court before the order of inquisition to have an interview with the alleged lunatic to ascertain his mental condition, after the order of inquisition the section can be invoked for the conduct of the inquisition proceedings, and an order requiring the alleged lunatic to attend Court for the purpose of being personally examined by the Court can be made under section 41 even before making an order for inquisition.

1. (1977) 1 M.L.J. 286.
2. (1977) 2 M.L.J. 385.
3. (1977) 2 M.L.J. 403.
4. (1977) 1 M.L.J. 306.

Constitutional law:

In *Perumal Chetty & Bros.* v. *State of Tamil Nadu*[1], it is held that a Government order under section 29 of the Tamil Nadu Buildings (Lease and Rent Control) Act granting exemption from the Act only to Hindu, Muslim and Christian charitable institutions is not invalid on the ground of its being discriminatory against Parsi religious institutions, that in considering the validity of the order the Court has to take the state of affairs in the State of Tamil Nadu for which the Act is intended to apply and that the plea of a Hindu tenant under a Hindu religious institution that because Parsi religious institutions are not exempted the law is discriminatoy cannot be accepted and in the instant case the tenant was not directly affected. *Dharmarajan* v *Union of India*[2], lays down that whatever be the basis or the nature of the challenge and whatever be the cause of action pleaded in the writ petitions and whatever be the error complained of in the order passed by the executive, there can be no gainsaying that, in the instant case, they led to one grievance only, namely that the petitioner's rights are affected, and those rights, whatever might be the limited ground on which they are sought to be enforced, must be traced ultimately, to the rights conferred by Part III of the Constitution; and the moment the enforcement of those rights in a Court of law are suspended no one would have *locus standi* to move the Courts for enforcement of his rights whatever be the particular ground on which those rights might happen to be asserted. *Karunanidhi* v. *Union of India*[3], decides

1. (1977) 1 M.L.J. 19.
2. (1977) 2 M.L.J. 22.
3. (1977) 1 M.L.J. 182.

that the words 'federation', 'autonomy' and 'federating States' have varying meanings and what a particular word means depends on the context; it will be totally misleading to apply the meaning given to the words in the context of the American Constitution to our Constitution; if the word federation can be used at all, India is a federation of various States designated in the Constitution for the purpose of efficient administration and governance of the country; that State as such has no inherent power or autonomous power which cannot be encroached upon by the Centre; the powers of the Centre and the States will have to be looked for in the Lists and Articles of the Constitution; that the theory of federation and the States having some powers apart from the Constitution has no basis, the States have no existence apart from the Constitution; that it has been held consistently by Courts that requirements under Article 77 (1) and (2) are merely directory and the Government, if necessary, can lead evidence to prove that the proceedings were taken according to the requirements of the Constitution and the rules. *Chidambaram Chettiar* v. *Government of Tamil Nadu*[1], holds that there can be no doubt that the questions relating to the validity of the Tamil Nadu Debt Relief Act are very important and involve the interpretation of the provisions of the Constitution, that the questions do not admit of two opinions as there can be no doubt about the competence of the State Legislature to enact the impugned legislation, that as the question is not fairly open to argument, it will not be a substantial question of law and hence the petitioner is not entitled to a certificate either under Article 132 or 133 of the Constitution. *K. Mathew* v. *T. N. K. Estates*[2], makes it clear that the norms for grant of leave to appeal to the Supreme Court are that the case should involve a substantial question of law of general importance and that in the opinion of the High Court the question needs to be decided by the Supreme Court; that whether a particular case poses a substantial question of law is essentially a matter which depends upon the merits of each case; that what is substantially a question of law would, of course, depend upon the facts and circumstances which arise in a particular situation and it would be hazardous to iron-jacket an elastic expression such as a substantial question of law within certain set norms and principles; and that the question whether a suit could be filed for possession simpliciter without regard to the letter and spirit of the latter part of section 115 of the Transfer of Property Act is a substantial question of law of general importance. *Associated Transports* v. *Union of India*[1], points out that suspension of Article 166 (3) does not mean that all the rules framed under that Article have been abrogated, that during a period of Proclamation of emergency the Governor being a person equated to the President can himself act and no question of delegation arises, that the Secretary functions by virtue of the powers validly given to him by the Governor, and that the appointment of the Advisers and the allocation of the work between them was in exercise of the powers which have been vested in the Governor by the Notification of the Proclamation of President's rule. *Dharmarajan* v. *Union of India*[2], states that where the right to raise an objection based on statutory provisions is within the ambit of the order of suspension of fundamental rights passed by the President of India under Article 359 (1) of the Constitution no writ can lie. *Mohd. Aboobacker* v. *Tamil Nadu Wakf Board*[3] lays down that the Constitution has made it clear that where an alternative remedy provided in the concerned statute was not availed of no writ petition under Article 226 should be entertained and where an order passed under the Wakf Act was challenged by the mutawalli on the ground of non-mention specifically of the relevant sections no relief can be granted since a misquotation of the section or the omission to quote a pro-

1. (1977) 1 M.L.J. 443.
2. (1977) 2 M.L.J. 121.

1. (1977) 2 M.L.J. 107.
2. (1977) 2 M.L.J. 22.
3. (1977) 2 M.L.J. 164.

vision of law would not make the notice or order unenforceable and much less illegal. *Muthu Velu Udayar* v. *State of Tamil Nadu*[1], decides that where the petitioner did not avail himself of the remedies vouchsafed to him under rule 6 of the Tamil Nadu Panchayats Rules and rushed to the Court he should not be granted any relief whatsoever in exercise of the Court's extraordinary jurisdiction under Article 226. *Doraisami* v. *Bank of India*[2], expresses the view that only if an employee had a statutory status she would be entitled to the relief of declaration of being in employment, if the termination of her services was in contravention of statutory provisions and hence where the petitioner had no such status she would not be entitled to any relief under Article 226 and her remedy, if any, was to approach the civil Court. *Madras Steelware Industry* v. *Joint Chief Controller*[3], makes it clear that where the petitioner could not ask an authority to do a thing which that authority admitted that it would be beyond his power to do and that what he did earlier which provoked the petitioner to seek for enforcement of that order was based on a mistaken appreciation of facts, there was no justiciable or enforceable right vested in the petitioner and he could not ask for a writ of *mandamus*.—*Thangathammal* v. *Secretary, Food Department*[4] points out that in the context of the proceedings of the Rice Milling Industry Regulation Act, no individual has a right, strictly so-called, to obtain for himself a permit or licence, any more than he has to prevent its being granted to another; that the grant of a licence under the Act is essentially an act of administrative discretion, although in taking a decision the concerned authority might perforce have to take note of relevant factual considerations bearing on public interest and might choose to hear representations from private interests also; and, by merely putting forward the considerations germane to a proceeding under

1. (1977) 2 M.L.J. 117.
2. (1977) 2 M.L.J. 60.
3. (1977) 2 M.L.J. 212.
4. (1977) 2 M.L.J. 221.

section 5 (4) of the Act an existing rice mill owner cannot acquire *locus standi* to challenge the validity of a grant to another person. *W. S. Insulators of India Ltd.* v. *Presiding Officer*[1], states that the writ Court exercising jurisdiction under Article 226 is not completely bereft of authority to enquire and find out the realities in a particular case; it may be that in the course of such enquiry some factual investigation may be called for; there is no total ban or bar on the Court to undertake such an investigation in the interests of justice; *a fortiori* it may be necessary to do so in a case where it is reasonably felt that the adjudication of a dispute between the workmen and the management would unnecessarily be protracted and the length of delay, which is avoidable could be sliced to a great extent if an enquiry into the merits and facts is undertaken even when exercising the visitorial jurisdiction under Article 226.

In *State of Madhya Pradesh* v. *Ratan Singh*[2], the Supreme Court holds that under section 401 of the Code of Criminal Procedure, 1898, the appropriate Government has the undoubted discretion to remit or refuse to remit the sentence and where it refuses to remit the sentence no writ can be issued directing the State Government to release the prisoner. In *S. Narayana Iyer* v. *Union of India*[3], the Supreme Court lays down that Courts have no jurisdiction under Article 226 to go into the reasonableness of telephone rates and charges, for the reasons (*i*) when any subscriber to a telephone enters into a contract with the State he has the option to enter into a contract or not, (*ii*) the telephone tariff is subordinate legislation and legislative process and the rules framed regarding the rates are laid before each House of Parliament and they take effect when they are passed by Parliament, and (*iii*) the question of rates is first gone into by the Tariff Inquiry Committee which is headed by non-officials and the tariff rates are then placed before the House

1. (1977) 2 M.L.J. 424.
2. (1977) 1 M.L.J. (S.C.) 19.
3. (1977) 1 M.L.J. (S.C.) 41.

in all the budget proposals and the rates therefore become a legislative policy as well as a legislative process and is not for judicial determination. *Palanichami* v. *Canara Bank*[1], states that it is not correct that exercise of a contractual right of termination of services by an employer could be scrutinised and interfered with by the Court under Article 226 and that where an order of termination of service is made in exercise of the power conferred on the employer under the terms of a contract the order cannot be set aside by the Court. *Collector of Customs* v. *Mehta Paint Works*[2], decides that Rules 13 (*a*) and (*b*) of Chapter IV of the Scale of Rates Chargeable by the Port Trust are in the nature of a contract between the parties and cannot be enforced by the issue of a writ of *mandamus*. *Ramachandran* v. *Tudaiyalur Co-operative Agricultural Services Ltd.*[3] expresses the view that whether a person was by reason of conviction for an offence of sale of adulterated milk by an employee of a Milk Supply Society of which he was the President suffered disqualification for membership of a Co-operative Society has to be decided only after notice to the person and affording him an opportunity to put forward his case, and an order terminating his membership without giving him such opportunity cannot be allowed to stand and can be set aside under Article 226. *Somasundara Pandarasannadhi* v. *State of Tamil Nadu*[4], makes it clear that for a consideration of the objections preferred against a notification published as per Government's direction to the Commissioner of Hindu Religious and Charitable Endowments to arrange for such publication declaring its intention to extend the provisions of the Hindu Religious and Charitable Endowments Act to a particular endowment on the ground of mismanagement to be legally effective, it should be done after hearing the objector and affording him an opportunity of proving the truth of his objections; and where neither the Commissioner nor the Government had called upon the petitioner to substantiate his objections by any oral representation or the production of evidence it could not be said that the objections of the petitioner were considered at all and the impugned order was liable to be quashed. *Bhama Ramamoorthy* v. *State of Tamil Nadu*[1] points out that where lands are sought to be acquired exercising the power of eminent domain the minimum that could be expected of the Government is to follow the procedure strictly and that where the notification issued under section 4 (1) of the Land Acquisition Act as published in the Gazette had not shown the name of the petitioner as it ought to have in view of a change of the revenue registry, the notification was liable to be quashed. *Ramaswamy* v. *Assistant Engineer*[2], holds that in view of the provision in section 7, Tamil Nadu Land Encroachment Act that before taking proceedings under section 6 of the Act the person sought to be evicted should be served with a notice under section 7, the initiation of notice for summary eviction in the absence of notice under section 7 served on the petitioner is not a proper compliance with the provisions of the statute and the impugned memorandum is therefore liable to be quashed. *Correya* v. *Deputy Managing Director (Tech.), Indian Airlines*[3], states that the officers and employees of the Indian Airlines Corporation have a statutory status and for violation of any of the statutory regulations relief can be sought and where the entire disciplinary proceedings against the petitioner were vitiated for violation of the basic principles of natural justice for instance, by reason of statements taken behind the back of the petitioner at the time of the preliminary enquiry being taken as substantive evidence, they are liable to be set aside. *K. R. Raman* v. *Special Deputy*

1. (1977) 2 M.L.J. 474.
2. (1977) 1 M.L.J. 15.
3. (1977) 2 M.L.J. 472.
4. (1977) 2 M.L.J. 301.

1. (1977) 1 M.L.J. 323.
2. (1977) 1 M.L.J. 162. Cf. *Krishnappa Mudaliar* v. *Government of Tamil Nadu*, (1977) 1 M.L.J. 406 holding that section 4 (1) notification is purely preliminary in nature and is administrative in character and no writ will lie to quash such a notification
3. (1977) 1 M.L.J. 364.

Tahsildar[1] decides that in view of the fact that three different dates were given for the so-called enquiry, even if such enquiry had been held, which was highly improbable, it should have been perfunctory without the petitioner having a real opportunity to prove his rights as a tenant and in those circumstances, in the interests of justice, the impugned order is liable to be quashed. *Ananthakrishnan Nair* v. *Dr. Ramakrishnan*[2] points out that in regard to the question whether an order, which is made final by reason of the in-built provisions in a statute is still revisable under the supervisory or visitorial jurisdiction of the Superior Court either under section 115 of the Civil Procedure Code or under Article 227 of the Constitution of India, in so far as the jurisdiction under the Constitution is concerned, it has to prevail because no statute enacted under the law can make an inroad into the provisions of the Constitution and, in so far as the revisional jurisdiction under section 115 of the Civil Procedure Code is concerned, there are certain guidelines in the section itself which permit the exercise of such jurisdiction. *Chidambaram Chettiar Firm* v. *State of Tamil Nadu*[3] holds that the provisions of Article 301 are subject to the powers under Article 304, that Article 304 will prevail over the general right of trade and commerce guaranteed under Article 301, that Article 304 also specifies that the Legislature of a State may impose such reasonable restrictions on the freedom of trade, commerce and intercourse with or within that State as may be required in the public interest, that whether the restrictions are reasonable or not is justiciable by Courts, and that the provisions of the Tamil Nadu Debt Relief Act, 1976 are valid and not unconstitutional. *Venkataraman* v. *State of Tamil Nadu*[4], holds that when once a police officer is absolved of all charges the reason which prompted the Government not to consider him for promotion is obliterated, so that the right to have his case reopened and his name considered for promotion with effect from the date when a person junior to him was promoted will revive; further he will be entitled to such consideration with the application of the same criteria which were brought to bear on the promotion of his juniors; if there was more than one such occasion the case will have to be reconsidered in relation to them all and on the same basis; refusal of these rights to him is a denial of equality of opportunity in the matter of employment and is hit by Article 16 and that this right cannot be denied to him even though he might since have retired having attained the age of superannuation. In *Dalavai* v. *State of Tamil Nadu*[1], the Supreme Court decides that the pension scheme formulated by the Tamil Nadu Government granting pension to anti-Hindi agitators contains the vice of disintegration and fomenting fissiparous tendencies; that if any State will be engaged in exciting emotion against Hindi or any other language such provocation has to be nipped in the bud because these are anti-national and anti-democratic tendencies; that there is no legislative sanction for the scheme and the Government could not by an executive order authorise payment of the pension scheme; that the pension scheme is unconstitutional and the budget sanction is equally unconstitutional; and the State will be competent to claim refund of the moneys illegally and unconstitutionally paid. *Chidambaram Chettiar* v. *State of Tamil Nadu*[2], expresses the view that the words in Entry 30 in List II of Schedule VII, to the Constitution have to be read disjunctively; that the legislative competency would relate therefore to (*i*) money-lending and money-lenders, and (*ii*) the relief of agricultural indebtedness; that the entry would cover not only the scaling down of debts due to money-lenders but also the liquidation of debts; and that the provisions of the Tamil Nadu Debt Relief Act may fall under Entry 30 of List II, money-lending and money-lenders, relief of agricultural indebtedness, and Entry 26, "trade and commerce."

1. (1977) 2 M.L.J. 234.
2. (1977) 2 M.L.J. 98.
3. (1977) 2 M.L.J. 1.
4. (1977) 1 M.L.J. 317.

1. (1977) 1 M.L.J. (S.C.) 40.
2. (1977) 2 M.L.J. 1.

Industrial and labour law :

In *Workmen of M. F. Club* v. *Presiding Officer*[1], it is pointed out that the activities of the Madras Flying Club Limited were carried on in a systematic fashion and with a commercial motive, that there was also no nexus between the main object, namely, study of aeronautics and the club's activities, and the Club was, therefore, an 'industry' within the meaning of section 2 (*j*) of the Industrial Disputes Act, 1947. *Management of Safire Theatre* v. *Additional Commissioner for Workmen's Compensation*[2] decides that section 2-A of the Industrial Disputes Act does not fully bar the remedy under section 41 of the Madras Shops and Establishments Act, 1947; that if a decision is rendered under section 41 (2) of the Madras Act before the Government had made a reference under section 10 of the Industrial Disputes Act, the decision would be final between the parties, but if before the conclusion of the enquiry under section 41 of the Madras Act, the Government makes a reference under section 10 of the Industrial Disputes Act the pending proceedings under the Madras Act cannot be continued, but if a reference has been made before the conclusion of the appeal under section 41 of the Madras Act the proceedings under the Industrial Disputes Act will have to be followed; that after a reference had been made under the Industrial Disputes Act, the provisions of section 41 of the Madras Shops and Establishments Act would not be applicable; the dispensing with the services of the workmen could not be challenged under section 41 of the Madras Act; and that section 41 of the Madras Act is not repugnant to the provisions contained in section 2-A of the Industrial Disputes Act and is not rendered ineffective by the provisions of Article 254 of the Constitution. *Industrial Chemicals Ltd.* v. *Labour Court*[3], holds that it is open to the Labour Court in exercising jurisdiction to take note of the several cicumstances in the particular case before it and decide not to grant the relief of reinstatement, but grant instead relief by way of compensation to the workman; it is this principle on which section 11-A of the Industrial Disputes Act is based; there is nothing in section 25-F to show that the term 'paid' was to be understood in any special or limited sense, so whatever meaning the expression has under the common law or general law must also be intended to be connoted when the term is employed in the section and if under the general law a cheque was regarded as tantamount to payment of money upon no principle can a similar position be denied for payment by cheque under section 25-F; that the true position in law is that when a cheque is accepted by the creditor the date of accepting the cheque is regarded as the date of payment; that the settled conception of modern jurisprudence is to regard a cheque not as a conditional payment, but as a payment equivalent to cash, effective from the date of tender in all cases where the cheque is subsequently encashed and appropriated by the payee; that under section 25-G an employer may retrench any workman from service; if the workman was the last to be employed in his establishment, the employer can retrench him without assigning any reasons whatsoever in the notice of retrenchment; if, on the contrary the workman was not the last to be employed the employer must state reasons for retrenching him from service and record them in the notice of retrenchment; and that whichever way the issue as to retrenchment may be tossed about in discussion in individual cases, it must, in every case come down on all-fours to section 25-G. *Duraikannu* v. *General Manager, Parry's Confectionery Ltd.*[1] states that a domestic tribunal is not a Court and the rules of evidence are not applicable to proceedings before it; that the scope of the tribunal's enquiry in a petition for approval under the proviso to section 33 (2) is very limited; that where on an identical charge and evidence in a criminal prosecution against an employee he has been found not guilty on merits and therefore acquitted no departmental enquiry can be under-

1. (1977) 1 M.L.J. 99.
2. (1977) 2 M.L.J. 191.
3. (1977) 1 M.L.J. 389.

1. (1977) 1 M.L.J. 521.

taken on the identical charge and a finding of guilty given on like or identical evidence ignoring the finding of a competent criminal Court of acquittal on merits; but if an acquittal in a criminal prosecution is on a technical ground or by giving the benefit of doubt, the position would be different and in such a case the departmental enquiry on a similar charge and evidence would be open and no want of *bona fides* could be attributed to the enquiry.

Contracts and ancillary laws:

In *Saraswathi Ammal* v. *Lakshmi Ammal*[1] it is held that mere proof of relationship however near it may be, may not be sufficient for a Court to assume that one relation was in a position to dominate the will of another, that such bonds of kinship which are universally felt should not be mistaken as equivalent to saying that one kinsman could unduly influence the other in the circuit of such bondage, that even if any advice is given it may be influence but not undue influence: and that one other feature to be established on materials pleaded and acts established is that the bargain is so unconscionable that it could reasonably be said that the person sought to obtain unfair advantage for himself and so as to cause injury to the person relying upon his authority or aid. *Pitchaiah Pillai* v. *Govindaswami Chettiar*[2], holds that section 23 of the Contract Act attaches itself only to an illegal contract and it does not attach itself to any illegal act outside a contract; hence where there is no term or stipulation or condition in an agreement which is in violation of any provision of law, the agreement is not hit by section 23. *Kamala Sugar Mills Ltd.* v. *G. B. Bhahan Singh*[3], points out that public policy is not an immutable doctrine and with the passage and march of time it changes and has to change; that unless the Court is satisfied on the pleadings and the evidence let in that the bargain contained in a contract is so irrational, unconscionable, illegal and avoidable the normal course of a contract ought not to be stemmed, but on the other hand the Court should aid to follow up such contracts and ease the method to implement them; that section 23 provides the basis for Courts to find whether a contract is opposed to public policy: that the foundation on which the principle of public policy is based is that no Court will lend its aid to a man who founds his cause of action upon an immoral or illegal act, but it is always necessary that the Court's conscience should be satisfied that the illegality, immorality or irrationality complained of in a contract goes to the very root of the matter and shakes its foundation; that commercial transactions couched in easy and understandable language and contained in a contract have to be respected according to their tenor; that Courts ought not to be astute to defeat the efficacy of such documents or destroy such bargains; that while interpreting a commercial contract a broader outlook has to be adopted and care should be taken to avoid an artificial and unreasonable approach in the matter of understanding the meaning and purpose of such documents; that in such cases the Courts should occupy the chair of the contracting parties and reasonably undertand their minds and intents; that if after such an approach the instrument still presents circumstances which the conscience of a reasonable and prudent person cannot accept and if *ex facie* the terms are so unconscionable, illegal and designed to avoid or evade law, then only the doctrine of public policy will intervene and will not implement such bargain; and that a clause in a contract vesting a right in the seller to accept or reject orders formally booked by its representatives and a clause whereunder a higher price can be demanded by the seller under certain circumstances cannot be whittled down and thrown out as clauses opposed to public policy. *Dorairaj* v. *Rajan*[1] states that under section 23 an agreement is lawful unless it is forbidden by law or the Court regards it as opposed to public policy; that except in cases where the law forbids it with a view to the protection of the public, normally the Court may enforce the con-

1. (1977) 2 M.L.J. 179.
2. (1977) 1 M.L.J. 107.
3. (1977) 1 M.L.J. 149.

1. (1977) 1 M.L.J. 198.

tract and that where the parties entered into a partnership for running a touring cinema under the licence issued in the name of one partner completely unaware of the legal position that the partnership itself might be considered to be hit by section 23, and on the retirement of one partner the others executed a promissory note in his favour for the amount due to him which represented the amount which the retiring partner had paid to the other partners, the latter were bound to return the money under section 65. *Sundareswaran* v. *Sri Krishna Refineries*[1], lays down that a claim for compensation or damages on the part of a self-interested buyer who postponed the demand for delivery without cause but obviously with intent to gain a material advantage to himself is not just and cannot be accepted; that such a buyer cannot take advantage of undue benefit out of such a voluntary act and take advantage of a favourable market that in contracts of sale of goods if during the working or performance of the same, customs or excise duty or tax on the sale or purchase of goods was imposed by any law and such an imposition takes effect, under section 64-A of the Sale of Goods Act the seller might add so much of such increase to the contract price as would be equivalent to the amount paid or payable in respect of such tax or increase of tax and he would be entitled to sue for and recover such addition, but if the buyer refuses to pay the same either expressly or by necessary implication the buyer will be deemed to have disengaged himself from the position from which he could demand performance and consequently demand damages for non-performance. *VE.A. Firm* v. *Indian Overseas Bank Ltd.*[2], expresses the view that when the customer, a firm, carrying on business in India had obtained accommodation from the plaintiff bankers at their Penang branch in respect of which they offered, with the permission of the Reserve Bank, Indian securities in the form of fixed deposits which the firm had deposited with the Trichy branch of the plaintiff and the customer later on asked the bankers to adjust the available securities, then the time taken by the Bank in conjunction with the Reserve Bank to adjust the amount was only in the stream of procedural process of realisation and did not have an impact upon the substantive relationship of debtor and creditor. *Madasami Nadar* v. *Virudhunagar Municipality*[1], makes it clear that in order to rest a claim under section 70 of the Contract Act, there need not be a pre-existing legal obligation on the part of the claimant to supply or serve; that so long as it is not an officious overbearance on the part of the plaintiff to intermeddle and cause the supply to be made or cause the work to be done he can claim compensation provided he did make such supply or did the work not intending to do so or supply gratuitously; that if it is clear that the plaintiff *bona fide* acted with the genuine intention of supplying the goods or doing the work, then if it is not intended to be a free or gratuitous act, he is bound to be compensated by the other party for such an overt but sincere act done by the initiating party should not go awaste since the party against whom compensation is claimed did have the benefit of the supply of the goods or the performance of the work; and that so long as the act is not illegal the jurisdiction of the Court to grant relief is always available so as to avoid unjust enrichment and also on the basis of an implied forging of a quasi-contract between the two parties. *Seth Dhanoonal Parsram* v. *Kuppuraj*[2], states that section 131 provides for a contract to the contary because under the Act the death of the surety would operate as a revocation of the continuing guarantee in the absence of a contract to the contrary; there is no provision in section 130 for such a contract and the section in terms refers to a notice to the creditor and says that a continuing guarantee may, at any time, be revoked by the surety as to future transactions by notice to the creditor; that it is open to the parties to provide as to the manner in which notice to the creditor under section 130 is to be given; and therefore, if the parties provide for a particular method by which such a notice for revocation of the guarantee

1. (1977) 1 M.L.J. 51.
2. (1977) 2 M.L.J. 354.

1. (1977) 1 M.L.J. 257.
2. (1977) 1 M.L.J. 86.

under section 130 has to be given such a contract is a binding contract and it cannot be brushed aside on *a priori* considerations.

Ramaswamy Padayachi v. *Rangaswami Padayachi*[1], decides that in a case of sale of property with an agreement to reconvey, if the suit for reconveyance was filed within the period agreed to under the agreement to recovey, for execution of the reconveyance document, it is open to the intending purchaser to file the suit offering or tendering the amount in the plaint itself and stating his readiness and willingness to perform his part of the contract. *Arunachala Thevar* v. *Govindarajan Chettiar*[2], expresses the view that while section 19, clause (*a*) of the Specific Relief Act lays down the general principle that it is only a party to the contract who can be sued, in other words, the clause recognises that a stranger to the contract is not a proper or necessary party to a suit to enforce it; clause (*b*) provides exceptions to the general rule according to which a subsequent purchaser in order to successfully resist a suit for specific performance of a prior agreement for sale must establish that he is a purchaser for value without notice of the general agreement of sale and he paid consideration money for the sale before he had notice of the prior agreement; that clause (*b*) requires four elements to be proved to successfully claim the benefit of the exception, *viz.*, (*i*) that the transfer was for value; (ii) that the consideration had been paid; (*iii*) that the subsequent transferee has taken the transfer in good faith, and (iv) that both the purchase and payment of consideration had been made without notice of the prior contract; that the clause contemplates a transferee who has got a document executed, who has paid the money in good faith and without notice, who gets the document registered in accordance with the law giving retrospective effect to the transaction from the date of execution; that where a buyer paid full money before the date of execution of the deed in good faith and before the receipt of the notice of the contract of sale from a prior buyer, he is a transferee in law from the date of the execution of the conveyance within the meaning of section 19 (*b*) and the transferee is protected; that section 19 (*b*) lays down a general rule that the original contract may be specifically enforced against a subsequent transferee, but allows an exception to the general rule not to the transferor but to the transferee, and therefore it is clearly for the transferee to establish the circumstances which would allow him to retain the benefit of the transfer which *prima facie* he had no right to get. *Rangasami Gounder* v. *Periamuthu Gounder*[1] states that the expression 'unfair advantage' in section 20 (2) means that it should be such that on an overall appreciation of the situation the Court should come to a conclusion that the complaining party has been tricked and that there was a designed approach on the part of the plaintiff to victimise the alleged affected party; that in the light of the *Explanation* I to the section mere inadequacy of consideration is no ground to refuse the discretionary relief of specific performance; and that even in cases where the price is grossly inadequate, Courts require an additional dose of proof that by reason of such design on the part of an avaricious purchaser the vendor has been victimised. *Fathima Bivi* v. *Sadhakatalla*[2] holds that section 33 provides that when the Court adjudged cancellation of an instrument on the ground that it was void or voidable, it had the power to call upon the plaintiff at whose instance the instrument was adjudged void or voidable to restore, so far as may be, any benefit which he might have received from the other party and to make any compensation to him which justice may require and that where a sale of property belonging to Muslim minors was made by their mother and the proceeds utilised in discharge of liabilities of the minors' father and the sale was set aside as incompetent and void the minors should pay their share of the liability because admittedly the sale proceeds were applied for the discharge of the debts of the estate. *Saraswathi* v. *Somasundaram Chettiar*[3] points out that section 28 while providing for the remedy of

1. (1977) 2 M.L.J. 51.
2. (1977) 2 M.L.J. 431.

1. (1977) 1 M.L.J. 231.
2. (1977) 1 M.L.J. 478.
3. (1977) 2 M.L.J. 68.

rescission of the contract in the suit for specific performance has actually provided that such relief can be obtained only in the same suit and that no separate suit in respect of such relier could be instituted: that in view of the express provision contained in section 28 (1) the Court while decreeing a suit for specific performance can prescribe a time-limit for deposit of money by the decreeholder and also extend the time on an application by the parties in proper cases as is clear from the expression " within the period allowed by the decree or such further period as the Court may allow";that the decree in a suit for specific performance is in the nature of a preliminary decree and having regard to the express provisions in section 28 which constitute the statutory crystallisation of the legal position in this behalf the Court has no jurisdiction to provide that if there is a default in making the deposit within the time stipulated in the decree the suit shall stand dismissed since that will destroy the character of the decree as a preliminary decree and disable the Court from granting the relief provided for in section 28 (3).

In *Shah Dhanoomal Parsram* v. *Kuppuraj*[1] points out that the principle underlying material alteration presupposes that there was a writing to which the executant of the negotiable instrument was a party and that the writing was given the go-by by a conscious overt or covert act on the part of the creditor resulting in a material alteration to the instrument; that establishing that a negotiable instrument has been altered in a superfluous sense will not suffice to prevent the creditor from instituting a suit on such an altered instrument; and that the debtor should also further establish that there was a material alteration in the sense that what is sought to be put up in Court was not the contract between the parties and was not what was intended between the parties at or about the time it was executed.

Property law, land tenures and related legislation.

In *Arunachala Thevar* v. *Govindarajan Chettiar*[2], it is stated that the definition of 'notice' in the Transfer of Property Act includes both actual and constructive notice; that a *bona fide* contract, whether oral or written, prevails against a subsequent registered conveyance if the transferee had 'notice' of the prior contract; that a purchaser is deemed to have 'notice' of anything which he had failed to discover either because he did not investigate the title properly or because he did not enquire for deeds relating to the property; that the onus of proof lies upon the party seeking to defeat the prior contract to adduce *prima facie* evidence that he is a *bona fide* transferee for value without 'notice' but the burden is light and he may discharge it by merely denying the factum of notice on oath; and that in any case very little evidence is required to prove this fact which is negative. *Nagheetha Maraccir* v. *Govindaswami Naidu*[1], lays down that when a person had no power to transfer to another a particular property but erroneously represents that he had such power and purports to transfer title in that property to another it will attract section 43 if he subsequently acquires any interest in or title to that property; that it is no defence to the person estopped to plead that the transferee had made no proper enquiry as section 43 does not impose upon the transferee the duty of taking reasonable care; and that though the representation related to his authority to transfer an interest in the property and not to his title to the property the common law doctrine of equitable estoppel by deed embodied in section 43 will apply. *Karuppa Gounder* v. *State of Tamil Nadu*[2] makes it clear that section 53 cannot be used as a weapon; that a special procedure is contemplated by that section which is mandatory; that if such a suit is filed and brought to the portals of the civil Court of original jurisdiction, then the creditor concerned should contemporaneously file an application as an elementary precaution under Order 1, rule 8, Civil Procedure Code so as to make it appear that he was instituting the suit not on his own behalf but on behalf of or for the beneft of the general

1. (1977) 1 M.L.J. 86.
2. (1977) 2 M.L.J. 431.

1. (1977) 1 M.L.J. 411.
2. (1977) 2 M.L.J. 55.

body of creditors; that the mandate which is compulsive cannot be bypassed and the sole creditor who comes to Court after a period of four years cannot be permitted to convert the suit which is initially defective into one which comes within the purview of Order 1, rule 8 of the Civil Procedure Code; that the words 'a creditor' and 'shall be instituted' appearing in para 4. of section 53 (1) of the Transfer of Property Act do not have a clear bearing upon the interest and content of a peculiar procedure contemplated under the Act; and that if a litigant including the State wants to avail the special procedure under the Transfer of Property Act, then it is necessary for the plaintiff in such suit to strictly adhere to the manner and method by which such suit could be brought to the portals of a Court of original civil jurisdiction avoiding the Court exercising insolvency jurisdiction. *Alagappan* v. *Kalyarasundaram Iyer*[1] states that the law which has so far developed and is likely to develop hereafter in respect of equitable mortgages should be confined to the particular facts of those cases; that if there is evidence which would compel the Court to hold that under a single bargain the borrowing and the deposit of title deeds were effected and the intention is made clear and public only in such a contemporaneous transaction, then a memorandum evidencing such a bargain needs registration; that a recital in the memorandum as to the quantum of the amount borrowed would not make the memorandum any the less a registrable document provided it is an independent transaction and not the sole bargain to evidence the deposit of title deeds, that the only important feature on which the Court should pay its concentrated attention is that the deposit of title deeds should have taken place earlier than the time of the writing of the memorandum: that if such a dissociation in point of time is apparent from the memorandum itself or if it could be discovered from the totality of the facts and appreciation of the surrounding circumstances, then the plaintiff can successfully pilot his case on the foot of an equitable mortgage and obtain a mortgage decree; if however the Court is not satisfied about the earlier deposit of title deeds and the memorandum projected is the only piece of evidence whereby the equitable mortgage is created the Court has to hold that such a memorandum is not admissible in evidence for want of registration.

Vaiyapuri Gounder v. *Kaliarna Gounder*[1] lays down that in an agreement to reconvey, the understanding to reconvey the properties should form part of the bargain of the original sale of the properties; that constitutes the very essence of the agreement to reconvey; once that understanding is absent, the mere fact that subsequently an agreement was entered into between the two parties who happened to be the vendee and the vendor under the earlier transaction will not convert the agreement into an agreement to reconvey and it will remain and continue to be an agreement of sale of immovable properties simpliciter. *Mohammed Ismail* v. *Alagappa Chettiar*[2] expresses the view that if by process of law or by a compelling situation sanctioned by law, the security given to a creditor metamorphoses itself and changes into something other than the property which constituted the original security, then a mortgagee or chargeholder over the quandom property can trace his right to such metamorphosed security under the doctrine of substituted security enunciated in section 73 of the Transfer of Property Act. *Ponnaih Thevar* v. *Nallayam Perumal Pillai*[3] makes it clear that where the position of the alleged lessee is struck by section 76 (*a*) of the Act, such alleged lessee is not a tenant at all at the time when he is inducted on the land as tenant whatever else he may be. *Abdul Hamid* v. *Rangaswami Chettiar*[4] points out that section 106 requires the notice to expire with the end of the month and where the tenant was asked to deliver possession on the 30th November, which would be at the last moment of the day, the notice would be in order. *Renga Iyengar* v. *Sivaswamii Pandaram*[5] states that parts of sections 109

1. (1977) 2 M.L.J. 291.

1. (1977) 1 M.L.J. 11.
2. (1977) 1 M.L.J. 76.
3. (1977) 2 M.L.J. (S.C.) 1.
4. (1977) 1 M.L.J. 452.
5. (1977) 2 M.L.J. 265.

110 and 111 of the Transfer of Property Act contain mere rules of procedure or rules of a technical nature; to state that sections 105 to 116 of the Act are founded upon principles of reason and equity is not either correct or precise; to the extent that those sections give statutory recognition to the principles of justice, equity and good conscience they are applicable also to cases not governed by the Act; if a provision of the section in the Act is considered as a statutory recognition of the principles of justice, equity and good conscience that would be applicable to agricultural leases also and, when a tenant was in possession on the basis of a lease for an indefinite period he was entitled to assume, and justly, that he would be permitted to continue so long as he paid the rent and complied with the conditions of the lease and if the landlord wanted to terminate the lease in those circumstances it was really just and necessary that he should intimate and terminate the tenancy so, that the tenant could be put on notice that the tenancy was going to come to an end. *Meenakshisundaram* v. *Paul Asari*[1] decides that where the case was not one of forfeiture but of determination of tenancy there is no scope for the application of section 114 of the Transfer of Property Act and where the tenant had been a chronic defaulter there was no scope for exercising any equitable powers for the purpose of relieving the tenant from eviction.

Nachar v. *Palanisamy*[2], expresses the view that where the grant of land was for service to be performed by keeping the kist collections in a village safely and remitting them into the treasury, the other members of the family of the grantee would not be entitled to any interest in the service inam, irrespective of whether they rendered service or whether they were fit to render service in relation to the kist collections of the village; that the office-holder was entitled to the inam exclusively when the service was abolished and he alone had become entitled to the property exclusively by nature of the grant of patta after enfranchisement; and that the property could assume the character of joint family property in his hands and would be joint family property of his branch if the enfranchisement had been made in favour of any of his heirs after his death.

Venkataswami v. *Ramireddi*[1], points out that a landholder in order to be entitled to a ryotwari patta under section 13 (1) (*b*) of the Madras Estates (Abolition and Conversion into Ryotwari) Act must prove that he has cultivated the land himself or by his own servants or hired labour from 1st July, 1945 and has been in direct and continuous possession of the land from that date, and that the requirement of the provision is not satisfied if the landholder is merely able to show that there was an intention to cultivate or resume the land for cultivation. *Kasi Viswanathan Chettiar* v. *Chinnaiah Chettiar*[2] lays down that if the person who claimed patta under section 19-A was found to be a trespasser and not a person admitted to possession by a landholder, then he could not be given a patta under that section; that even where the Government chose to issue a patta to such a person it could not be treated as one under section 19-A; that it would be in the nature of an assignment or a charge-grant; that the pre-requisite for the applicability of section 19-A was a legal possession by admission by the landholder of communal land; and that where the patta was issued in the name of the defendant who as the eldest member of the joint family was in possession and management of the entirety of the joint family properties, he could not rely on the issue of the patta in his name alone as conferring on him or entitling him to any right in the property and the patta will enure to the benefit of the joint family. *Satyanarayana Rao* v. *State of Tamil Nadu*[3], states that in order to come within the definition of an inam estate, three conditions will have to be satisfied; firstly, the grant should be of both the warams or of the melwaram to a person already owning the kudi-

1. (1977) 1 M.L.J. 537.
2. (1977) 2 M.L.J. 305.

1. (1977) 1 M.L.J. (S.C.) 1.
2. (1977) 2 M.L.J. 524.
3. (1977) 1 M.L.J. 302.

waram thereof, secondly, it should be of the whole village or named village and thirdly, the grant should have been made, confirmed or recognised by the British Government; where the grants of two minor inams and portion of the village remaining thereafter were confirmed by the Inam Commissioner separately and three separate title deeds were issued and the Inam Commissioner had recognised by confirmation of the part of the village the title of the grantee derived from the original grant, it could not be said to be a confirmation of a whole village; that if the grant was of a specified fraction of a village or a specified number of shares in a village, the inam could not be covered by the definition of "inam estate" under section 2 (7) of the Madras Act XXVI of 1948 and it would not also be an 'existing inam' in section 2 (4); it is only those inams that were sought to be covered under section 2 (11) of Madras Act XXVI of 1963; if 'part inam village' is understood as literally meaning any part of a village then, that will directly come under *Explanation* 1 (*b*) to section 2 (11); and all those inams which related to a part of a village or with reference to a specified extent of land would be covered by the definition of 'minor inam' in Madras Act XXX of 1963 and they would not be 'part village inam estate' under section 2 (11). *Mayuranathaswami Devasthanam* v. *Jagadeesa Thevar*[1], holds that the Minor Inams (Abolition and Conversion into Ryotwari) Act of 1963 provides for the acquisition of the rights of inamdars in minor inams in the State of Madras and the introduction of ryotwari settlement in such inams as stated in the preamble to the Act; that the Government shall not dispossess any person of any land in the inam estate in respect of which they consider that he is *prima facie* entitled to a ryotwari patta pending the decision of the appropriate authority; that even before the grant of ryotwari patta the possession by any person of any land in a minor inam is protected if the Government considers that he was *prima facie* entitled to ryotwari patta; that to that extent there is a restriction of the vesting of the estate; that once a patta is issued the grounds on which it had been granted cannot be probed into in execution proceedings; and that a combined reading of sections 3 (*b*) and 13 of Act XXX of 1963 shows that the buildings in an inam do not vest in the Government under section 3 (*b*). *State Wakf Board* v. *Ibrahim Sahib*[1] makes it clear that 'kyrati' is a term applied to inams held for personal benefit by Mahomedans and it is more specifically applicable to grants or alms given by or to Mahomedans; kyrati zamin signifies lands given in charity, and therefore, where the grant is a personal grant it could not be a wakf.

In *Ponniah Thevar* v. *Nellayan Perumal Pillai*[2], the Supreme Court points out that a life estate holder is entitled to create a tenancy and such a tenancy could extend beyond the life of the life estate holder; the contrary view will run counter not only to the principles underlying the creation of statutory tenancy rights in agricultural land throughout the country but will also conflict with the particular statutory protection conferred upon cultivating tenants in the State of Tamil Nadu; the statutory definition of 'landholder' relates not only to the person creating the lease but contemplates and takes in every successive holder who could be entitled to evict a tenant; that person can only be one who has the right at the time of filing the suit to realise rents or evict persons in wrongful occupation; there is nothing in the Madras Cultivating Tenants Protection Act to show that the protection given to the cultivating tenant as defined in the Act was given only against his original lessor and did not extend to subsequent holders of land occupying the capacity of the landlord; the provisions of the Act show that they became enforceable as soon as the Act became operative and there is nothing in the Act to show that it ceased to be operative at any time or was limited in its operation only as a protection given to persons who were cultivating tenants in 1955. *Vellaiki Konar* v. *Kamala Devi*[3]

1. (1977) 1 M.L.J. 336.

1. (1977) 1 M.L.J. 324.
2. (1977) 2 M.L.J. (S.C.) 1.
3. (1977) 1 M.L.J. 353.

lays down that if privileges are granted by statutes on account of certain policies and for the reason that they should benefit a ryot or a cultivating tenant then, the person seeking such benefit should not only be alert but certainly not guilty of laches or negligence; the condition precedent for the Court or competent authority to act and decide under section 3 (3) of the Tamil Nadu Cultivating Tenants' Arrears of Rent (Relief) Act is that there must have been an earlier adjudication or pronouncement on the question whether the cultivating tenant has paid or deposited or is deemed to have paid or deposited the correct amount as contemplated in section 3 (1) (*a*); such an enquiry or adjudication is specifically provided for in section 3 (1) (*c*); whereas such a delve into the matter is conspicuously absent in section 3 (3); the stage at which the question as to the correctness of the deposit or the form of payment has to be adjudicated upon is when the tenant applies for relief under section 3 (1) (*a*), (*b*) and (*c*) and not under section 3 (3) of the Act; it may be that tenant can ask for the consequential relief even in an application under section 3 (1) (*c*), but when he independently applies under section 3 (3) and asks for an enquiry as to whether he has paid or deposited the correct amount of current rent, then, it cannot be said that in an enquiry under section 3 (3) such an adjudication on the correctness of the deposit or payment is also possible; what has to be done under section 3 (3) appears to be that the Court or the competent authority should be satisfied that there was a quandom or prior adjudication on the question whether the correct rent has been paid or deposited in accordance with section 3 (1) (*c*); if proof of such adjudication is forthcoming then the Court or the competent authority has to automatically allow the application under section 3 (3) and grant the guaranteed relief to the cultivating tenant; and under section 3 (3) there is no legal obligation on the part of the competent authority to enquire into the question whether the payment or deposit made was not correct. *Sankaralinga Thevar* v. *Thirumalammal*[1], states that where on the date the civil Court passed its decree and judgment declaring a person as cultivating tenant, section 16-A of the Tamil Nadu Agricultural Lands Record of Tenancy Rights Act was not in force and the jurisdiction of the Civil Court was not barred, such decree and judgment can be set aside only by procedure known to law and any other tribunal constituted by law cannot act in such a manner as to set aside the decree and judgment passed by the civil Court.

1. (1977) 1 M.L.J. 189.

Insolvency law : In *Munirathinam Naidu* v. *Messrs. Meera Financiers*[1], it is pointed out that the Presidency Towns Insolvency Act has not defined the term 'business', that the trend of judicial decisions has been in favour of enlargement rather than restriction of the connotation of trade and business and that so long as the liabilities incurred in the course of a business remained unchallenged the business activity should be deemed to continue. *Epoh I.O.B.* v. *Mohamed Musthaba Sahib*[2] expresses the view that the vesting of the property of a debtor under the Provincial Insolvency Act will not have the effect of vesting his property in a foreign country, the foreign Court cannot direct the vesting of the debtor's properties in India at any rate so far as immovable properties are concerned as the doctrine of *lex situs* is applicable; likewise so far as immovable property is concerned, the adjudication of the debtor will have no effect on the insolvent's immovable property in a foreign country and such property will not vest in the official assignee; hence there being no bar to execution under section 44-A, Civil Procedure Code, execution will lie. *Devayee* v. *Ramaswami*[3] holds that a claim to maintenance is being incapable of being fairly estimated and would squarely fall under the proviso to section 33 (1) and section 34 (1) of the Provincial Insolvency Act, as being a debt which would have to be excluded from the schedule on the ground that its value was incapable of being fairly estimated; hence, section 28 (2) of the Act became inapplicable and a suit for maintenance will not be barred under that

1. (1977) 2 M.L.J. 399.
2. (1977) 1 M.L.J. 349.
3. (1977) 1 M.L.J. 80.

provision; and whatever remedy the wife might have to proceed against her husband's salary to the extent permitted under section 60, Civil Procedure Code was not taken away by the Insolvency Act *Official Assignee* v. *Suresh Electric Company*[1] states that in order to invoke the principle of reputed ownership under section 52 (2) (*c*) of the Presidency Towns Insolvency Act not only must the property be goods that should be in the possession of the insolvent but it should have been used in his trade and what was even more important was that it should have been so used in the circumstance that the insolvent was the reputed owner of the goods.

Hindu law and related legislation.—In *Kandammal* v. *Kandiah Thevar*[2], it is held that a gift of ancestral property made by a Hindu father to his wife at a time when a son had been conceived by her and was in his mother's womb is void *ab initio* and not merely voidable; the son need not set aside the gift within 3 years after attaining majority or within the extended period of 12 years under Article 109 of the Limitation Act; failure to do so will not extinguish his rights under section 27 of that Act; and his possession of the concerned property will be in his own right. In *Commissioner of Wealth tax* v. *Sridharan*[3] the Supreme Court makes it clear that legitimate children of a Hindu father by a Christian mother who are brought up as Hindus would be governed by Hindu law; that where the son was brought up as a Hindu member of the family to which his father had belonged the son was a Hindu and could validly be a member of a Hindu undivided family headed by his father and be governed by Hindu law; that section 21 of the Special Marriage Act, 1954 guarantees *inter alia* to the issue of the person whose marriage has been solemnised under the Special Marriage Act a collateral statutory right of succession to the estate of the latter in case he dies intestate; that it does not in any way impair or alter the joint family structure between such person and his son; nor does it affect the discretion vested in the Hindu person to treat his properties as joint family properties by taking into his fold his Hindu sons so as to constitute joint family properties *Jayaramachandra Iyer* v. *Thulasi Ammal*[1] decides that where there was proximity between sale of joint family property and purchase of a house in the name of one of two brothers and the amount received under the sale was far in excess of what had to be paid for acquiring the house coupled with the fact that the two brothers were living amicably in the same house though having separate mess and belonged to an undivided Hindu family, a presumption arises that the acquisition of the house was with joint family funds and the property acquired enured to the benefit of the family. *Pattammal* v. *Nagarajan*[2], states that where one purpose of the sale of property by the karta of a joint family was to avoid paying interest on a mortgage debt and secondly, there was no other means by which the mortgage debt could be paid off and the property was an indivisible property subject to the mortgage, it cannot be said that there was no legal necessity to sell the entirety of the property and the sale cannot be questioned by the sons. *Soundarathammal* v. *M.A.B.M. Sangam*[3] holds that before a temple or a shrine or other holy place can be accepted and recognised as a place of public religious worship there should be evidence of dedication of the same for the benefit of the Hindu community or a section thereof the guidelines are that it should be a place of public worship, there should be acceptable proof of dedication, and/or the worshippers have been using as of right the religious institution as a place of public worship; merely because the members of the public are allowed to attend religious festivals and ceremonies it cannot straightaway be said that such user was due to an inherent or acquired right of the public to visit the shrine and offer worship; and the mere fact that Hindu worshippers have been freely admitted to the temple does not prove the temple to be a public institu-

[*To be continued*]

1. (1977) 1 M.L.J. 36.
2. (1977) 1 M.L.J. 121.
3. (1977) 1 M.L.J. (S.C.) 5.

1. (1977) 2 M.L.J. 461.
2. (1977) 2 M.L.J. 286.
3. (1977) 1 M.L.J. 125.

tion, because the consonance of Hindu sentiment and practice is not to turn away worshippers even in private temples. *Munuswamy Achari* v. *Rajambal Ammal*[1] points out that the accepted position under Hindu law is that where a limited owner succeeds to an estate, the succession to the estate on her death will have to be decided on the basis that the last full owner died on that day and the inevitable corollary is that it is only the law in force at the time of the death of the limited owner that should govern the case; to hold that the old Hindu law applies to such a case is to allow the imagination to boggle. *Animuthu* v. *Gandhiammal*[2] makes it clear that a combined reading of the provisions of the Hindu Adoptions and Maintenance Act, the Hindu Women's Rights to Property Act and the Hindu Succession Act shows that when there is no factual obtaining of a share in coparcenary property a widow could claim maintenance against the coparcenary property from her father-in-law; the quantum of liability of the father-in-law depends on his means to do so from any coparcenary property in his possession under the proviso to section 19, clause (1) of the Hindu Adoptions and Maintenance Act; and though her right to a share both in the separate and self-acquired property as well as the interest in the coparcenary property of her husband is not liable to be divested on the ground of her remarriage, her right to maintenance under sections 19 and 22 will cease on such remarriage. *Amritham Kudumban* v. *Sornam Kutumban*[3], lays down that the right to set aside an alienation of a minor's property by the guardian is available under section 8 (3) of the Hindu Minority and Guardianship Act, 1956, not only to the minor himself but also to any person claiming under him which latter expression includes a transferee of the minor. *Duraisamy Naicker* v. *Balasubramanian*[4] states that irrespective of the existence of a natural guardian, a Hindu mother can appoint a guardian for her minor children in respect of her separate property bequeathed to the minors under a will and the testamentary guardian cannot sell such property without the prior permission of the Court even though section 28 of the Guardian and Wards Act authorised the testamentary guardian to sell the property inasmuch as under section 5 (*b*) of the Hindu Minority and Guardianship Act any other law in force immediately before the commencement of the Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in the Act.

1. (1977) 1 M.L.J. 371.
2. (1977) 2 M.L.J. 379.
3. (1977) 1 M.L.J. 1 (F.B.)
4. (1977) 2 M.L.J. 92.

Law of evidence: In *Muruswami Naidu* v. *Thyagaraya Chettiar*[1], it is held that merely because the Oaths Act of 1873 had been repealed what was stated on special oath would not cease to be evidence; the fact that the plaintiff had given a statement under special oath will not deprive its status as evidence and it cannot be said that because he had taken a special oath he is in a worse position than if he had taken an ordinary oath. *Abdul Kareem Hajee* v. *Director Enforcement Directorate*[2] states that quasi-judicial tribunals are not bound by technical rules of evidence but the principle shutting out hearsay evidence is not a mere technical rule coined by the Evidence Act but is a rule of natural justice; for oral evidence to be of any value it must ordinarily flow from a witness who can be held responsible for its truth (which can be sifted through cross-examination) so that, in acting upon it, the Tribunal concerned may not start with an initial hesitancy; when a piece of evidence is such that there is no *prima facie* assurance of its credibility it would be dangerous to act upon it and hearsay evidence being evidence of that type has to be excluded whether or not the case in which its use comes in for question is governed by the Evidence Act. *Associated Cotton Traders Ltd.* v. *Union of India*[3] expresses the view that the maxim *res ipsa loquitur* is a rule of evidence which it is convenient to apply in those circumstances in which a plaintiff in negligence discharges his task of establishing want of care on the part of the defendant without having to prove any specific negligence or omission by the de-

1. (1977) 1 M.L.J. 358.
2. (1977) 2 M.L.J. 47.
3. (1977) 2 M.L.J. 335.

fendant ; when all the facts are known there is no room for the application of the maxim but when all the facts are not known the maxim helps the plaintiff to discharge the onus which lies upon him of proving negligence ; and the effect of the invocation of the maxim is that the mere happening of an accident affords reasonable evidence in the absence of explanation by the defendant that it was due to the defendant's negligence. *Nataraja Deekshidar* v. *Aiyathurai Padayachi*[1] holds that casting the burden of proof wrongly amounts to a substantial error in procedure. *G.P. Damani* v. *Trustees, Port of Madras*[2], expresses the view that under the Commercial Documents Evidence Act of 1939 the statement contained in a protest note can be presumed to be accruate and it is *prima facie* evidence. *Sethurathnam Pillai* v. *Lucy Baskara Josephine*[3] states that the presumption of marriage taking into account long cohabitation being a rebuttable one; it is necessary to show that the man and the woman were not merely living together but professed themselves to be husband and wife and were treated as such by relations and friends ; such conduct and recognition must extend over a long period of time, and if there are circumstances which weaken or destroy that presumption the Court cannot ignore them. *Kesava Bhagavathar* v. *Varadayya Bhagavathar*[4] lays down that if there is an oral agreement to receive a lesser sum than what was due under a mortgage deed such agreement will be hit by the proviso to section 92 (4) of the Evidence Act; if it is in writing unless it is registered it will be hit by section 17 (1) (*b*) of the Registration Act; that where the waiver of interest noted in an endorsement not having been registered is inadmissible in evidence the endorsement is admissible so far as it related to the acknowledgment of receipt of the amount paid on that date; the production of the bond by the defendant with the endorsement of payment only casts on the plaintiff the burden of proving that the debt was still outstanding ; the presumption under section 114 in such cases is only a rebuttable presumption and the plaintiff could not be non-suited solely on the ground that the original bond was produced by the defendant.

1. (1977) 1 M.L.J. 297.
2. (1977) 1 M.L.J. 32.
3. (1977) 2 M.L.J. 141.
4. (1977) 1 M.L.J. 528.

Law of limitation : In *Ramanathan Ambalam* v. *Shanmughavel Pillai*[1], it is pointed out that the law of limitation has to be interpreted grammatically, there is no scope for equity in it, nor is there any intendment in it; the period prescribed in the various Articles in the Limitation Act starts in accordance with the tenor and language of the concerned Article and there is no scope for argument based on reasonableness, nor can there be any ground for complaint of hardship when such a period prescribed under the law of limitation works itself out and confers a benefit on one and takes away the right from another. *Chinnaiah Kounder* v. *Kattayya Kounder*[2] holds that section 6 of the Limitation Act shows that minority does not in any way affect possession being adverse ; though *prima facie* under Article 65 read with section 6 (1) a suit for recovery of possession could be filed by the minor within 12 years from the date when he attained the age of majority in case the impugned transaction was void, by reason of section 8 such a suit will have to be filed within 3 years of attaining majority and the minor could claim the extended period of 12 years ; the period of limitation therefore for recovery of possession by a minor in respect of a void transaction is 12 years from the date of sale or 3 years after he attained majority whichever is longer ; and where whether it is three years of attaining majority by the minor or 12 years from the date of sale the period had already lapsed by the time the plaintiff (the person in possession) filed his suit for a declaration of his title, in effect the suit is for a declaration that the defendant is not entitled to recover possession of the property from the plaintiff and that his remedy is lost or his right is extinguished and the suit construed in that manner is maintainable. *Govindaswamy* v. *Bhoopalan*[3] decides that section 5 of the Limitation Act is applicable to an application

1. (1977) 1 M.L.J. 168.
2. (1977) 2 M.L.J. 382.
3. (1977) 1 M.L.J. 411.

under section 9 of the Madras City Tenants Protection Act of 1922 because, under section 29(2) of the Limitation Act, 1963 where any special or local law prescribed for any application a period of limitation different from the period prescribed in the Schedule, the provisions of section 3 of that Act shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for such application the provisions contained in sections 4 to 24 shall apply unless the applicability of any of these provisions is excluded or modified. *Nageetha Maracair* v. *Govindaswami Naidu*[1] points out that the period of limitation to enforce a liability under sections 65 and 235 of the Contract Act will commence from the date of discovery of the fraud or misrepresentation and Article 55 of the Limitation Act, 1963, will apply. *Muthalu Ammal* v. *Amudam*[2] states that the alienation contemplated by Article 60 of the Limitation Act is alienation by a lawful or *de jure* guardian and alienation made by a *de facto* guardian is not covered by the Article. *Mayava Kounder* v. *Subbaraya Kounder*[3] holds that to enable a co-owner to acquire title to the entirety of the common property to the exclusion of the other co-owners by prescription, the co-owner in possession must assert hostile title to the knowledge of the co-owners out of possession and in the absence of assertion of such hostile title to the knowledge of the co-owners out of possession there cannot be any acquisition of title by prescription by the co-owner in possession. *Nagamalai Thevar* v. *Pandaram*[4] states that symbolic delivery of possession is binding not only against the parties to the record but also against the legal representatives of a party to the record and such symbolical delivery of possession will arrest adverse possession by the latter. *Veerayya Pillai* v. *Ramanatha Iyer*[5], lays down that whatever might be said with reference to a transfer effected

1. (1977) 2 M.L.J. 206.
2. (1977) 2 M.L.J. 215.
3. (1977) 1 M.L.J. 113.
4. (1977) 2 M.L.J. 392.
5. (1977) 1 M.L.J. 313.

subsequent to an attachment, adverse possession which had already commenced would not be stopped or prevented by such attachment alone without bringing the property to sale before the expiry of the period of limitation. *Munuswamy Achari* v. *Rajammbal Ammal*[1] expresses the view that Article 65 read with *Explanation (b)* to that Article applied generally to all suits by Hindu plaintiffs, where the right to possession is claimed on the death of a female Hindu; the claim may be that of a reversioner of the last male holder or it may be that of an heir of a deceased female Hindu; whatever be the case provided the right of possession in the suit property is claimed on the death of a female Hindu, the deeming provision of *Explanation (b)* to Article 65 would operate and the suit for possession would be within time if filed within 12 years of the death of the female Hindu on whose death the plaintiff claims possession.

Civil Procedure Code.—In *Karuppammal* v. *T.U. Poosari*[2], it is held that if, in a suit for partition where the dispute between the parties was about the share and the extent which each one of them was entitled to, there was an erroneous declaration of the shares or even as to allotment of a certain extent, the proceedings of the Court will not be without jurisdiction; the civil Court has ample jurisdiction to decide an issue rightly or wrongly and that would not make the decision one without jurisdiction. *Ramanathan Ambalam* v. *Shanmugavel Pillai*[3], points out that to invoke *Explanation* V to section 11 of the Code of Civil Procedure, the grant of relief by the concerned Court should be on a full and final adjudication of the rights of parties after a considered appreciation of the relative contentions; where no relief as such is granted but on the other hand the contesting plaintiff does not press for such relief and the Court sitting in judgment over the particular *lis* considers that it was not necessary for it to grant or refuse any such relief asked for on the

1. (1977) 1 M.L.J. 371.
2. (1977) 1 M.L.J. 360.
3. (1977) 1 M.L.J. 168.

ground that no relief was asked for against a particular defendant in action, then, in such a situation, it cannot be said that the Court granted relief; such a grant should be on a full examination of the merits of each claim before the Court and after a proper adjudication giving a reasonable impression that the Court applied its mind and came to the conclusion that the relief should or should not be granted; and it is in this context that the language in *Explanation V* in section 11 which says that any relief claimed in the plaint which is not expressly granted by the decree should for the purpose of this section be deemed to have been refused, has to be understood. *Sreepathi Hosiery Mills* v. *Chitra Knitting Company, Tiruppur*[1] makes it clear that section 20 of the Code appears to be omnibus in nature and is subject to the limitations mentioned in the Chapter where it is placed; one such limitation is that contained in section 19 under which whenever a suit for compensation for wrong done to person or movable property is filed, the option is with the plaintiff to institute the suit based on such cause of action, at the place where the defendant resides or works for gain or at the place where the wrong was committed; there is no way out of this limitation as to jurisdiction envisaged in section 19; when the Code, which more or less lays down the substantive law though procedural in aspect regarding such matters of jurisdiction, creates certain peripheries and limitations particularly in the matter of laying suits in the forum of specified Courts, then no option is left to the litigant except to strictly adhere to such prescription in the Code; he cannot whittle down the express prescription in section 19 and lay emphasis on the oral evidence casually let in by him so as to create or vest jurisdiction in the Court which has none. *Poomalai* v. *Ramalingam*[2] states that on the passing of a decree for possession of the property, the judgment-debtor was under a liability to hand over possession of the property as it was on the date of the decree; if at the time of delivery it was found that the property decreed had depreciated in value by the positive and wilful conduct of the judgment-debtor, then the question how far the judgment-debtor could be liable for causing such depreciation in the value of the property could be dealt with as an issue arising in execution, as it fell within the scope of the expression "discharge or satisfaction of the decree"; and the plaintiff's application claiming damages was maintainable under section 47 of the Code. *Nachimuthu Chettiar* v. *Morthammal*[1] expresses the view that if the executing Court proceeds to execute the decree notwithstanding the pendency of an application by the judgment-debtor under section 20 of the Tamil Nadu Agriculturists Relief Act, 1938, claiming to be an agriculturist, it is contrary to section 20 which is a mandatory provision and, therefore, an application for setting aside the sale of the judgment-debtor's property held in contravention of section 20 would be under section 47 of the Code of Civil Procedure. *Ramaswami Naicker* v. *Jagadeesan*[2], decides that where the person claiming rateable distribution had filed an execution petition in a Court of superior jurisdiction to the Court in which the property was brought to sale and sold in auction and which held the said process, the provisions of section 63 read with section 73 are applicable, and the petitioner will be entitled to rateable distribution; he may call for the assets held by the Court of inferior jurisdiction to the credit of his suit in the higher Court and claim the amount due to him and it is for the respondent to go to the higher Court and claim rateable distribution. In *State of Kerala* v *General Manager, Southern Railway*[3], the Supreme Court points out that the Railways Act does not deal with the question as to who should be impleaded as a defendant when a suit is brought against a railway administration; this is essentially a matter relating to the frame of suits and is dealt with by the Code of Civil Procedure; according to section 79 of the Code, in a suit by or against the

1. (1977) 1 M.L.J. 222.
2. (1977) 1 M.L.J. 494.

1. (1977) 2 M.L.J. 40.
2. (1977) 2 M.L.J. 261.
3. (1977) 1 M.L.J. (S.C.) 60.

Government, the authority to be named as plaintiff or defendant, as the case may be, shall in the case of a suit by or against the Central Government, be the Union of India, and the Southern Railway being owned by the Government of India, a suit dealing with the alleged liability of that railway should be brought against the Union of India. *Gopalakrishna Pillai* v. *Chinnapillai Padayachi*[1] holds that facts proved or admitted may provide evidence to support further conclusions to be deduced from them, which conclusions may themselves be conclusions of fact and such inferences from facts proved or admitted could be matters of law; and the Court could intervene in second appeal if it appears that the fact-finding authority had acted without any evidence or upon a view of the facts which could not reasonably be entertained or the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination in question. *Ananthakrishnan Nair* v. *Dr. Ramakrishnan*[2] points out that in so far as the revisional jurisdiction under the Constitution is concerned, it has to prevail because no statute enacted under the law can make an inroad into the provisions of the Constitution, in so far as the revisional jurisdiction under section 115, Civil Procedure Code is concerned there are certain guidelines in the section itself which permit the exercise of such jurisdiction; while provision as to appeal is no doubt the creature of statute, the revisional jurisdiction is available to the complaining litigant so as to subserve the ends of justice; when the statute expressly makes an order of the subordinate Court final it means that the concerned statute is not prepared to provide another remedy against it; in such cases appeal would not lie to the higher Court by invoking the ordinary common law; and the finality of the decision in appeal under section 9-A (1) of the Madras City Tenants Protection Act, does not preclude a revision being preferred against the order.

1. (1977) 2 M.L.J. 368.
2. (1977) 2 M.L.J. 98.

Palaniswamy Gounder v. *Nachimuthu Gounder*[1], makes it clear that a Court can take notice of events which have happened after the institution of the suit and afford relief to the parties in the changed circumstances so as not to drive them to a fresh litigation and so as to do complete justice between the parties, and, the Courts have inherent powers to give adequate relief to suitors in suitable cases in view of changed circumstances after the filing of the suit so as to shorten litigation. *K. A. M. Sheriff* v. *Ramu Reddiar*[2], states that the plaintiff in a suit cannot be compelled to implead as defendant a person against whom he seeks no relief and the Court will be reluctant to force an additional defendant into the action against his will; but, having regard to the object of the Legislature to avoid multiplicity of suits and to ensure that the matter is finally decided in the presence of all the parties interested, without delay and expenses, the trial Court has been given the power to add a person as defendant even if the plaintiff may object to such joinder. *Nataraja Iyer* v. *Nacharammal*[3], holds that under Order 5, rule 9 (2) of the Code even though the summons was sent by post, if the defendant did not appear on the day fixed on the summons, the Court has to direct that the summons should be delivered or sent to the proper officer to be served by him or by one of his subordinates on the defendant; and, that where a discretion is conferred upon the Court coupled with an obligation, the word 'may' (in Order 5, rule 9 (1)) denotes 'shall'. *E. K. M. K. Nawabjan* v. *Krishnan Chettiar*[4], takes the view that the affixture of notice of execution petition on the appellant's residence on his refusal to accept the notice appears to be due service as contemplated by Order 5, rule 17 and so long as the statutory provision contemplates service by affixture when the party refuses to receive the summons it cannot be said that there has been no proper service. *Subramania Mudaliar* v.

1. (1977) 2 M.L.J. 131.
2. (1977) 1 M.L.J. 517.
3. (1977) 1 M.L.J. 47.
4. (1977) 1 M.L.J. 382.

Ideal Finance Corporation[1] lays down that where the records showed that the judgment-debtors were not in their respective residences at the time the process-server called but the process-server's is report did not say that the judgment-debtors did not have any agents to receive the notices on their behalf nor did it appear that any attempt was made to serve the notices on any adult members of the family in their residences and the process-server straightaway proceeded to affix the notices stating that the judgment-debtors were out of town, it is not good service under Order 5, rule 17. *Md. Salih Sahib* v. *T. C. Adam Sahib*[2] decides that amendments to the pleadings cannot be turned down by Courts merely on the score that they introduce an inconsistent plea or a new cause of action and that the true test is whether the amendment is foreign to the subject-matter of the suit and, if not, whether it would be in the interest of justice to grant it. *Dharmasekaran* v. *State Bank of India*[3]. points out that Order 9, rule 13 sets out two alternative grounds for having an *ex parte* decree set aside in an application under that rule; the applicant can satisfy the Court that (*i*) the summons was not duly served, or (*ii*) he was prevented by any sufficient cause from appearing when the suit was called on for hearing; he could request the Court to set aside the *ex parte* decree on any of the two grounds; even if there has been a proper and sufficient service at the stage of the suit and at the stage of final decree proceedings, if he satisfies the Court that he was prevented from appearing in Court he can seek the setting aside of the *ex parte* decree. *Chidambaram* v. *Kalidas*[4] expresses the view that Order 17, rule 3, applied only where the parties were present; where, on the date of the trial, the defendant was absent the Court could not proceed under Order 17, rule 3, but should proceed under Order 17, rule 2, by setting the defendant *ex parte* and decreeing the suit after recording the evidence if the claim of the plaintiff was proved. *Palanivel Pillai* v. *Sivakolundu Odayar*[1], states that ascertainment of mesne profits in actions in which it is possible is a matter which is solely guided by the guidelines set in Order 20, rule 12; there is no escapement out of it as this is almost a prescriptive mandate and Courts cannot make inroads into it by seeking to otherwise interpret the specific and unambiguous provision; the enquiry as to rent and mesne profits can be made by a competent Court for a period commencing from the date of the institution of the suit till the expiry of three years from the date of the decree; the decree referred to may be a decree of the trial Court or the decree of the first appellate Court or the decree of a Court in the higher hierarchy as well; the decree to be reckoned is the decree which has become final in the eye of law and in accordance with the procedure available; and there is abundant authority to say that the absence of a direction as to the enquiry into mesne profits in the final decree in a suit where possession and mesne profits were asked for and both reliefs were granted will not be a fact which should weigh with the Courts to negative such an enquiry and to grant the reckoned profits after such an enquiry. *Kodiketti Nadar* v. *M.L. M. Fernando*[2], makes it clear that certification of payment under Order 21, rule 2, is possible under two different heads; it can spring from an actual payment of money by the judgment-debtor to the decree-holder or secondly by an adjustment of the said decree to the satisfaction of the decree-holder either in part or in whole; in either case, however, the *dominus litis* to bring such matter to the Court's view is the decree-holder himself since it is his responsibility to certify such payment or other adjustment and bring it to the notice of the appropriate Court who shall act accordingly, but Order 21, rule 2, does not pose an empty formality; if a case of certification or adjustment comes up before an executing Court and if the judgment-

1. (1977) 2 M.L.J. 385.
2. (1977) 2 M.L.J. 111.
3. (1977) 1 M.L.J. 271.
4. (1977) 1 M.L.J. 46.

1. (1977) 2 M.L.J. 65.
2. (1977) 1 M.L.J. 141.

debtor or the decree-holder himself is able to satisfy the conscience of the Court then the power of the Court is available so as to make a judicious probe into the legality, regularity or truthfulness of such payment or adjustment. *Ondipudur Weavers Co-operative Production and Sales Society Ltd.* v. *Velumani*[1], holds that it is a well established rule that while the machinery and remedy provided under Order 21, rule 32 (1), would cover cases of both prohibitory and mandatory injunctions sub-rule (5) of that rule will apply only to cases of mandatory injunction because it speaks of a positive act to be done by the judgment-debtor under the decree and wherever there is no mandatory injunction directing the judgment-debtor to do a positive act the remedy open to a decreeholder is to file a fresh suit seeking a mandatory injunction. *Nawabjan* v. *Krishnan Chettiar*[2], states that rule 54 (2) of Order 21, contemplates proclamation at some place on or adjacent to the property sought to be attached or sold by beat of drum or other customary mode; it also provides for a copy of the order being affixed on a conspicuous part of the Court-house and the Court cannot suggest a more elaborate method when the method contemplated by the statute has been followed. *Sivasangu* v. *Chinnaiah*[3], explains that Order 21, rule 66, relates to the drawing up of the proclamation of sale while rule 67, relates to the publication of the proclamation and where when the proclamation was settled the judgment-debtor's valuation was noted but that first sale was adjourned for want of bidders and the Court, on the subsequent settlement of the proclamation, did not mention the upset price, that would be tantamount to his fixing the other terms of the proclamation in accordance with the terms noted in the first proclamation and the fact that, in publishing it, the other terms noted in the first proclamation were not noted such as the judgment-debtor's valuation will not be a ground to set aside the sale; Order 21, rule 72, no doubt does not provide for any notice to be given to the judgment-debtor of a petition by the decreeholder for leave to bid at the auction, nevertheless since in exercising its discretion the Court should consider all the circumstances and exercise the discretion not arbitrarily but on judicial lines it is desirable for the Court to give notice to the judgment-debtor in regard to such petition so that the Court may be in a position to consider all the circumstances of the case; and though it would not be proper for the Court to grant permission to the decree-holder to bid at the auction even when the properties are brought to sale for the first time there is no warrant for the proposition that there should be at least two such attempts to bring the properties to sale before permission to bid could be granted to the decree-holder. *Subramania Mudaliar* v. *Ideal Finance Corporation*[1], points out that the procedure enabling a decree-holder to apply to the executing Court for leave to bid and set off is governed by Order 21, rule 72; the provision is couched in a negative form to the effect that no holder of a decree in execution of which property is sold, shall without the express permission of the Court, bid for, or purchase the property; the implication is that the Court has the discretion to grant permission to the decree-holder in this regard; the details of procedure for applying for leave to bid and set off are to be found in rule 199 of the Civil Rules of Practice, according to which an application for leave to bid at the sale shall be supported by an affidavit setting forth the facts showing that an advantageous sale cannot otherwise be had and the application must include an undertaking by or on behalf of the decree-holder that in the event of his being declared the purchaser of the property he would enter up satisfaction of the decree under which the sale is made for the amount of the purchase-money; that apart from the requirement that the decree-holder should make out a case for leave to bid and set off the executing Court must

---

1. (1977) 2 M.L.J. 19.
2. (1977) 1 M.L.J. 382.
3. (1977) 1 M.L.J. 134.

---

1. (1977) 2 M.L.J. 385.

itself be satisfied on the facts that such leave would be necessary for obtaining the most advantageous price in execution sale; it is settled law that an order passed by the executing Court allowing the decree-holder to bid and set off is a matter of great moment which vitally affects the property of the judgment-debtor and that this aspect by itself without more shows that it would be not only just but also necessary that the judgment-debtor should be notified of the decree-holder's application before any order is made against him. *K. A. M. Sheriff* v. *Ramu Reddiar*[1], holds that in a case where the validity of a revenue sale has been challenged only on the ground of irregularity it can be said that the Government need not be made a party as they can in any event bring the property to sale once again even if the sale is set aside on the ground of irregularity in the conduct of the sale but where the plaintiff's case is that there are no arrears of land revenue but none the less his property has been sold the Government is a necessary party to the suit. *Nawabjan* v. *Krishnan Chettiar*[2], decides that an execution sale of a property cannot be set aside merely on the ground that the price fetched by the sale is somewhat low or that it will fetch a higher price if resale is ordered. *Marimuthu* v. *Ambujam Ammal*[3], lays down that the relevant date for the purpose of finding out as to when the sale takes place in Court-auction in the course of execution of a decree is the date of the sale and not of its confirmation. *Alagappan* v. *Kalyanasundaram Iyer*[4], makes it clear that though the grant of interest on the costs of the action was available before the passing of the Central Act LXVI of 1956, yet after the date of the said enactment a mortgagee is not entitled to interest on the costs of the suit. *Baba Industries* v. *Mehta Traders*[5], states that the principle to be applied in the matter of grant of leave to defend is that if the Court is satisfied that the defence of the defendant is acceptable though *prima facie*, and also if the defence raises triable issue, thereby indicating that the defendant has a fair or *bona fide* or reasonable chance of success, or if the state of affairs is such that the Court is reasonably led to the conclusion that the trial of the action only can establish the truth, *bona fide* or otherwise, of the defence raised, then in such circumstances, the Court ought not to impose a condition in the matter of the payment of the plaint amount sought for by the plaintiff into Court, as security, before the grant of such leave. *Sri Krishna Textiles* v. *J. R. Exports*[1], holds that the fact that the defendant suffers a decree and prays for the satisfaction of the same by paying moneys at stated intervals or in monthly instalments would not alter the situation or wipe off as a matter of course the legal effect of the prior order of attachment before judgment of the properties of the judgment-debtor which was issued by a competent Court in a situation which compelled the Court to do so; an order made Order 38 of the Code, is independent and is not capable of being telescoped to an order permitting the defendant to pay the decree amount in monthly instalments or at stated intervals which might be passed by the trial Court on a written or oral application made by the judgment-debtor at about the time when the defendant suffers a decree by consent; and if therefore the two orders are not inter-dependable but are independent it cannot be contended that an independent order passed by a competent Court under Order 38 works itself out and becomes ineffective thereafter. *V. V. Devasthanam* v. *Arumugha Mudaliar*[2] lays down that where a receiver was appointed without any time limit there is in law nothing to prevent the receiver to take charge and then discharge his duties as directed by the Court and that until a receiver is actually discharged he could continue to function. *Ananthakrishnan Nair* v. *Dr. Ramakrishnan*[3].

1. (1977) 1 M.L.J. 517.
2. (1977) 1 M.L.J. 382.
3. (1977) 2 M.L.J. 218.
4. (1977) 2 M.L.J. 291.
5. (1977) 2 M.L.J. 479.

1. (1977) 2 M.L.J. 262.
2. (1977) 1 M.L.J. 92.
3. (1977) 2 M.L.J. 98.

points out that the accepted principle is that a receiver cannot be viewed as a substitute of parties but he also runs the race of litigation because he has been ordained to do so by virtue of his appoinment as receiver by an order of Court in that litigation; therefore even though there are receivers in an action, it cannot be said that the parties can keep silent about their rights and claim the same through the persons of the receivers; even if it be assumed that the application made by one receiver was on behalf of the other parties and other joint receivers such an application is not maintainable since each one of the parties entitled to the benefits under the concerned Act should come forward and file an application for such benefits; the appointment of a receiver does not absolve the affected party in the litigation for whose benefit the receiver had been appointed to efface himself and feel that he has no more obligation in the suit; *a fortiori* if certain rights and privileges are granted to a party to such a litigation by the beneficial provisions of a statute, then it is not the receiver who could set the law in motion on his behalf and obtain such statutory benefits or privileges and it is for the contesting party or the real party who would take advantage of the statutory concession or right to move the Court by himself. *Kasi Viswanatha Chettiar* v. *Chinnaiah Chettiar*[1] makes it clear that if an appellate Court did not dismiss the appeal summarily it should by virtue of rule 12 (1) of Order 41, fix a day for hearing of the appeal and therefore the Court could not admit the appeal in part and dismiss the appeal in part; that when the matter comes up for a admission under Order 41, rule 11, only two courses are open to the Court namely to dismiss or admit the appeal as a whole; and if the appeal is admitted in regard to one item of the concerned properties the appellant will be entitled to question the finding if the Courts below even in regard to the other item. *Subramainia Mudaliar* v. *Ideal Finance Corporaton*[2], states that Order 43, does not provide for an appeal against an order either granting or refusing to grant to the decree-holder leave to bid and set off in an execution sale, although it provides an appeal against an order of the executing Court setting aside or refusing to set aside the sale in favour of the decree-holder. *Venkataswami Reddiar* v. *Thirukamu Reddiar*[1], decides that a review cannot be asked for merely because by reason of a subsequent decision which is binding authority, the earlier decision interpreting the provision of any statute is found to be wrong.

Criminal law and procedure.— In *State of Madhya Pradesh* v. *Ratan Singh*[2] the Supreme Court points out that a sentence of imprisonment for life does not automatically expire at the end of 20 years including the remissions, because the administrative rules framed under the various jail manuals or under the Prisons Act cannot supersede the statutory provisions of the Penal Code; a sentence of imprisonment for life means a sentence for the entire life of the prisoner unless the appropriate Government chooses to exercise its discretion or remit either the whole or a part of the sentence under section 401 of the Criminal Procedure Code of 1898; section 401, confers an absolute discretion on the appropriate Government in the matter; the 'appropriate Government' empowered to grant remission is the Government of the State where the prisoner had been convicted and sentenced, that is to say, the transferor State and not the transferee State where the prisoner may have been transferred at his instance under the Transfer of Prisoners Act; such transfer has no bearing on the application of section 401, because this is merely an executive matter and an executive decision taken to meet the convenience of the accused; when the transferee State feels that the accused has completed a period of 20 years it has merely to forward the request of the prisoner to the concerned State Government; and under section

1. (1977) 2 M.L.J. 524.
2. (1977) 2 M.L.J. 385.

1. (1977) 1 M.L.J. 524.
2. (1977) 1 M.L.J. (S.C.) 19.

401 of the Code of Criminal Procedure, 1898, the appropriate Government has the undoubted discretion to remit or refuse to remit the sentence and where it refuses to remit the sentence no writ can be issued directing the State Government to release the prisoner.

———